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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 1115 [redacted]

DONALD L. DUNCAN,
Petitioner,

vs.

STATE OF CONNECTICUT,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Citations and Authority ii

Statement of the Case 1

Question presented 2

Argument

Point A 2

Point B 4

Conclusion 5

Appendix 1a

CITATIONS AND AUTHORITY

TABLE OF CASES

Card v. Bissing, 114 Conn. 71, 157 A. 644 4

Daniels v. Allen, 73 S. Ct. 397, 344 U.S. 443, 97 L. ed. 469 4, 5

French v. Hopkins, 8 S. Ct. 589, 124 U.S. 524, 31 L. ed 536 4

Griffin v. Illinois, 76 S. Ct. 585, 351 U.S. 12, 100 L. ed 891 4

John v. Paullin, 34 S. Ct. 178, 231 U.S. 583, 58 L. ed 381 5

Lesser v. Lesser, 134 Conn. 418, 58 A. 2d 512 4

State v. Zukauskas, 132 Conn. 450, 45 A. 2d 289 2

United States v. Smith, 306 F. 2d 596 5

TABLE OF STATUTES

General Statutes of Connecticut, Revision of 1958:

Section 51-16 (App. 1a) 3

Section 51-18 (App. 2a) 3

Section 52-264 (App. 3a) 3

Section 54-95 (App. 3a) 2

OTHER AUTHORITIES

The Connecticut Practice Book of 1951

Rules for the Supreme Court of Errors

Section 385 (App. 5a) 3

Section 388 (App. 5a) 3

Section 389 (App. 6a) 3

Section 436 (App. 6a) 3

Connecticut Appellate Procedure, Second Edition, William M. Maltbie, Atlantic Law Book Company, 1957 4

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STATE OF CONNECTICUT,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Donald L. Duncan, was charged with having committed a crime in Connecticut and he elected to be tried by the Court. He made this election on a substituted information when he was presented for trial on June 26, 1962, and *after* his motion for disqualification had been denied. On June 27, 1962, he was found guilty. On June 29, 1962, the Court sentenced petitioner, and on the same date Duncan appealed to the Supreme Court of Errors of the State of Connecticut.

Petitioner filed a Motion to Extend Time for Filing Draft Finding and Assignment of Errors. His motion was dated September 12, 1962. There was no objection and on September 20, 1962, the time for filing Request for and Draft Finding and Assignment of Errors was extended to October 23, 1962.

Petitioner filed a document which he called a Draft Finding and which was dated October 19, 1962. (App. B to Petitioner's Brief, p. 14)

On October 25, 1962, respondent filed his Motion to Dismiss the Appeal upon the ground that the petitioner had failed to file within the time allowed his Request for Finding stating the questions of law which he desired to have reviewed. (App. B to Petitioner's Brief, p. 18)

There was a hearing upon the Motion by the Supreme Court of Errors and on December 4, 1962, the Motion to Dismiss was granted. (App. B to Petitioner's Brief, p. 18)

Thereafter, petitioner filed the Motion for Permission to Reargue which appears on page 27 of Appendix B to his Brief. This Motion was denied on January 2, 1963.

QUESTION PRESENTED

Where petitioner, represented by private counsel, failed utterly to follow the long-established Rules of Practice of the Supreme Court of Errors of the State of Connecticut so that, upon motion by the respondent, his appeal was dismissed, does the decision of the State Court rest upon an independent and adequate state ground?

ARGUMENT

Point A

Dismissal of the Appeal rested upon an independent and adequate state ground.

SECTION 54-95 of the General Statutes of Connecticut permits an appeal by the defendant in a criminal case.

The right to appeal is not a constitutional right nor one based upon principles of natural justice.

State v. Zukauskas, 132 Conn. 450, 45 A. 2d 289

SECTION 52-264 of the General Statutes of Connecticut places the rule-making power in matters concerning appeals in the hands of the Judges of the Supreme Court of Errors. These rules appear in the Connecticut Practice Book. The Connecticut Practice Book is published by a commission which distributes copies without charge to attorneys engaged in actual practice in Connecticut. Authority for this is contained in SECTIONS 51-16 *and* 51-18 of the General Statutes of Connecticut.

The petitioner elected to be tried by the Court and he received a full and fair trial. He appealed from the judgment of the Court, as was his right.

Rule 385 of the Rules concerning appeals requires that there be a finding by the trial court except where error appears on the face of the record. Rule 388 requires that an assignment of errors be filed with the appeal except where a finding is necessary. Petitioner makes no claim that he filed an assignment of errors and his brief appears to concede that a finding was necessary.

Rule 389 sets forth in detail the procedure to be followed where a finding is necessary. It is explicit in stating that the party appealing shall file a request for finding, stating distinctly the questions of law which he desires reviewed. There was a complete and utter failure on the part of petitioner to include in his "Draft Finding" a statement of the questions of law which he desired to have reviewed. (App. B to Petitioner's Brief, p. 14) He makes no claim that he filed a Request for Finding, required by Rule 389. In his brief, he states that he moved for permission to file a Request for Finding on November 28, 1962. This was long after the time which the Court had permitted him had expired. In fact, this motion was not acted upon because the appeal was dismissed. Rule 436 provides for a Motion to Dismiss.

A request for a finding is a necessary step to perfect an appeal where a finding is required. Its purpose is to state the questions it is desired to have reviewed so that the opposing party may know the issues which will be presented upon the appeal and the trial court will be guided in making the finding.

Sec. 128, *Connecticut Appellate Procedure, Second Edition*

Card v. Bissing, 114 Conn. 71, 73; 157 A. 644

Lesser v. Lesser, 134 Conn. 418; 58 A. 2d 512

It is submitted that the Supreme Court of Errors acted properly in dismissing petitioner's appeal and that its action rested upon adequate state procedural grounds.

Point B

The action of the State Court does not present a question for review.

A decision of a state court resting on grounds of state procedure does not present a federal question, unless by its terms or in its application it violates the federal constitution.

French v. Hopkins, 8 S. Ct. 589; 124 U.S. 524; 31 L. ed 536

Griffin v. Illinois, 76 S. Ct. 585; 351 U.S. 12; 100 L. ed 891

Daniels v. Allen, 73 S. Ct. 397; 344 U.S. 443; 97 L. ed 469

Where the Supreme Court of a state holds that it is powerless to pass upon the merits of a case or the rulings below because its appellate jurisdiction is not invoked in accordance with the laws of the state, the Supreme Court of

the United States will not review its judgment.

John v. Paullin, 34 S. Ct. 178; 231 U.S. 583; 58 L. ed. 381
Daniels v. Allen, 73 S. Ct. 397; 344 U.S. 443; 97 L. ed 469
United States v. Smith, 306 F. 2d 596

This principle should have equal force where the Supreme Court of a state refuses to hear an appeal because it has not been prosecuted in accordance with its rules.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Errors of the State of Connecticut dismissing petitioner's appeal rested upon an independent and adequate state ground which ought not to be reviewed, and that the petition for a writ of certiorari should be denied.

Dated: May 27, 1963

Respondent,

State of Connecticut

By JOHN D. LABELLE,
State's Attorney for Hartford County

GEORGE D. STOUGHTON,
Assistant State's Attorney

HARRY W. HULTGREN, JR.
Assistant State's Attorney

APPENDIX

General Statutes of Connecticut, Revision of 1958:

SEC. 51-16. ACQUISITION, PUBLICATION AND DISTRIBUTION OF OFFICAL LEGAL PUBLICATIONS. (a) There shall continue to be a commission to acquire, publish and distribute and to maintain for the benefit of the state a sufficient supply of the official legal publications, which are defined as the Connecticut Reports and advance parts thereof, the Phillips Connecticut Digest and cumulative supplements thereto, the Connecticut Law Journal, the Connecticut Supplement, the digest of Connecticut Supplement decisions and cumulative supplements thereto, the Connecticut Practice Book and cumulative supplements thereto, the Connecticut departmental regulations and such additional publications as may be assigned to it. The commission is declared to be an agency within the judicial department and shall be known as the commission on official legal publications. It shall be composed of the chief justice of the supreme court of errors, who shall be chairman, ex officio; a judge or former judge of said court and a state referee, both of whom shall be appointed by the chief justice; the executive secretary of the judicial department, and the reporter of judicial decisions. It may appoint a selling agent or agents to handle the sales, and a publishing agent or agents to attend to the publication and distribution, under its supervision, of official and legal publications, upon such terms as it deems to be for the best interest of the state. Except to the extent that the commission otherwise appoints, the executive secretary of the judicial department shall be the commission's publishing agent. (b) The commission may utilize for the purposes of sections 4-46, 4-49, 4-50, 4-117 and 51-18 to 51-22, inclusive, any volumes which may be turned over to the state by the town clerks or other public officers or agencies. It may enter into contracts with publishing and printing concerns and others in this or any other state for the printing

or photolithographing and for the binding of such volumes as may be necessary, and for the storage of the volumes. (c) The commission shall have custody of the electroplates and stereotypes of the volumes of reports and may repair and replace the same from time to time when necessary for the proper printing therefrom. It may also sell any of said electroplates or stereotypes when in its opinion the same are no longer of use to the state. (d) Money received from sales permitted under this section and sections 51-18 and 51-23 shall be deposited with the state treasurer as provided by law and shall be credited to the general fund, and bills contracted and expenses incurred by the commission for the purposes specified in sections 4-46, 4-49, 4-50, 4-117, this section and sections 51-17 to 51-23, inclusive, shall be paid from moneys appropriated from the general fund.

SEC. 51-18. SALE AND DISTRIBUTION OF PUBLICATIONS. The commission may sell the official legal publications at such prices and upon such terms as to payment and security as it may fix and may sue in its name or take such other legal measures as may be appropriate to enforce payment of accounts due it. It shall furnish official legal publications free of charge to courts of record and law libraries within the state, and to public officers, departments, agencies, boards and commissions within the state, according to their legitimate needs as determined by the commission. It shall also furnish copies of the Connecticut Practice Book and supplements thereto, free of charge, to attorneys engaged in actual practice in Connecticut, according to their legitimate needs as determined by the commission. It shall, to the extent it finds it desirable to do so, cause official legal publications to be copyrighted in the name of the secretary of the state for the benefit of the people of the state.

SEC. 52-264. JUDGES OF SUPREME COURT TO MAKE RULES FOR APPEALS AND WRITS OF ERROR. The judges of the supreme court of errors shall make such orders and rules as they deem necessary concerning the practice and procedure in the taking of appeals and writs of error to the supreme court of errors, and concerning the giving of security by the appealing party, stay of execution during the pendency of appeal, the payment of costs and the taxation of reasonable costs when the same have not been fixed by statute.

SEC. 54-95. APPEAL BY DEFENDANT IN CRIMINAL PROSECUTION; STAY OF EXECUTION. (a) Any defendant in a criminal prosecution, aggrieved by any decision of the superior court or the court of common pleas, upon the trial thereof, or by any error apparent upon the record of such prosecution, may be relieved by appeal, petition for a new trial or writ of error, in the same manner and with the same effect as in civil actions; provided no appeal to the supreme court of errors may be taken from a judgment denying a petition for a new trial unless, within ten days after the judgment is rendered, the judge who heard the case or a justice of the supreme court of errors certifies that a question is involved in the decision which ought to be reviewed by the supreme court of errors; and it shall be sufficient service of any such writ of error or petition for a new trial to serve it upon the state's attorney for the county or prosecuting attorney for the county or district where it is brought. (b) When such defendant is convicted and sentenced to a term of imprisonment and, within one week after such conviction, files with the clerk of the court wherein such conviction was had an appeal to the supreme court of errors or notice of an appeal to said court or of a petition for a new trial, such appeal or such notice shall operate as a stay of execution pending the final determination of the case unless within five days the

judge before whom such criminal prosecution is tried otherwise directs in writing and accompanies such direction by a written statement of his reasons therefor. Such statement shall become a part of the files and record of said case. (c) In any criminal prosecution in which the defendant has been sentenced to death and has taken an appeal to the supreme court of errors of this state or the supreme court of the United States or brought a writ of error, writ of certiorari or petition for a new trial, the taking of the appeal, the making of the application for a writ of certiorari or the return into court of the writ of error or petition for a new trial shall, unless, upon application by the state's attorney and after hearing, the supreme court otherwise orders, stay the execution of the death penalty until the clerk of the court where the trial was had has received notification of the termination of any such proceeding by decision or otherwise, and for thirty days thereafter. No appellate procedure shall be deemed to have terminated until the end of the period allowed by law for the filing of a motion for reargument, or, if such motion is filed, until the proceedings consequent thereon are finally determined. When execution is stayed under the provisions of this section, the clerk of the court shall forthwith give notice thereof to the warden of the State Prison or his deputy. If the original judgment of conviction has been affirmed or remains in full force at the time when such clerk has received such notification of the termination of any proceedings by appeal, writ of certiorari, writ of error or petition for a new trial, and the day designated for the infliction of the death penalty has then passed or will pass within thirty days thereafter, the defendant shall, within said period of thirty days, upon an order of the court in which such judgment was rendered at a regular or special criminal session thereof, be presented before said court by the warden of the State Prison or his deputy, and the court, with the judge assigned to hold such session presiding, shall thereupon designate a day for the infliction of the death

penalty and the clerk of the court shall issue a warrant of execution, reciting therein the original judgment, the fact of the stay of execution and the final order of the court, which warrant shall be forthwith served upon the warden or his deputy.

The Connecticut Practice Book of 1951; Rules for the Supreme Court of Errors:

SEC. 385. FINDING NECESSARY, WHEN. If error appears on the face of the record no finding is necessary.

If the error claimed is in rulings upon the admission or rejection of evidence or other rulings in the court of the trial, in the charge to the jury or in conclusions of law or fact that do not appear upon the face of the record, a finding by the trial court is necessary.

If on an appeal from the granting of a motion to set the verdict aside the appellant desires to present such rulings, or if the decision upon the motion is based on such rulings, a finding is necessary, and should be in the form for findings in cases tried to the jury.

SEC. 388. ASSIGNMENT OF ERRORS, WHEN FILED. If no finding of facts be necessary to present properly the questions raised upon the appeal, the appellant shall file his assignment of errors with his appeal. If a finding is necessary, he shall file his assignment of errors within ten days from the filing of the finding. Assignments of error shall be filed with the clerk with whom the appeal was filed, and shall be in substantial accordance with Forms 561 and 562.

If the nature of the appeal is such as to require a finding, but before one is filed the appellant decides to withdraw so much of the appeal as makes a finding necessary, he shall file with the clerk a written notice of that withdrawal, accom-

panied by his assignments of errors as to that part of the appeal not so withdrawn.

SEC. 389. REQUEST FOR FINDING; COUNTER FINDING. In cases tried to the court, where a finding is necessary for the purposes of the appeal, the party appealing shall file, with his appeal, his request therefor, duly signed, stating distinctly the questions of law which he desires reviewed, and annex thereto a draft of such findings as he deems necessary to present these questions. The draft finding shall contain, under separate headings, a statement, in consecutive, numbered paragraphs, of the relevant and material facts proven, the conclusions of the court, the claims of law made in the trial court with the rulings of the court thereon, and the rulings on evidence or other rulings on the trial which the appellant desires to have reviewed. The draft shall be in substantial conformity with Form 559, and statements of rulings on evidence shall comply with SEC. 405.

The clerk shall forthwith mail a copy of the request and draft finding to opposing counsel, who shall, within ten days from the filing of the draft finding, file with the clerk a counter finding which shall state the paragraphs of the draft finding which are not contested and shall contain *only* such relevant and materials facts as are not in the draft finding, or such facts, conclusions, claims of law and rulings which arose in the trial as are claimed by him to be incorrectly stated in the draft finding.

Failure or refusal to file a counter finding within the time fixed by rule or order of court may be penalized by the imposition by the trial court of costs not to exceed twenty-five dollars for the use of the state.

SEC. 436. ALL DEFECTS TO BE RAISED BY MOTION; PROCEEDINGS THEREON. Any claim that an appeal or writ of error should be abated or dismissed,

whether based on lack of jurisdiction, failure to file papers within the time allowed, failure to prosecute with proper diligence or any other ground, shall be made by a motion to dismiss the appeal or writ. Any such motion must be filed in accordance with SEC. 438 within ten days after the filing of the appeal or the return day of the writ, or if the ground alleged subsequently occurs, within ten days after it has arisen, provided, a motion based on lack of jurisdiction or a failure to prosecute with proper diligence may be filed at any time. One copy of the motion shall be transmitted by the clerk by mail forthwith to the adverse party or his counsel of record. If the motion raises only an issue of law or alleges no facts not of record, no pleading need be filed to it, but the issue will be heard as one of law. If facts outside the record are alleged, the adverse party may file an answer within one week from the filing of the motion; and any pleadings necessary to close issues of fact may thereafter be filed within one week after the filing of the pleading to which they are addressed. Neither the motion nor any subsequent pleading shall be filed after the time herein limited, nor shall any amendment to any such pleading be filed, except on written motion and by consent of this court or, if it is not in session, of one of its justices; if such motion is presented to a justice, he shall indorse it with his action thereon and the party making the motion shall file it, so indorsed, with the clerk of the court where the case was tried, who shall give notice to those persons to whom copies of motions are required to be sent under SEC. 438.